Mar 9 2000 (32)

Supreme Court, U.S.
FILED
MAR 9 2000
OFFICE OF THE CLERK

No. 99-5525

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether a voluntary confession may be admitted into evidence in the government's case-in-chief under 18 U. S. C. § 3501, notwithstanding that the confession was taken without complying with the requirements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

INTEREST OF *AMICUS*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves an attempt to remove from the people the power to decide when valid, probative evidence taken in compliance with the Constitution may be admitted in evidence. Such a result would be contrary to the interests CJLF was formed to protect.

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

SUMMARY OF FACTS AND CASE

Defendant Charles Dickerson has been indicted for the 1997 robbery of the First Virginia Bank in Alexandria, Virginia, among other offenses. J. A. 32. Dickerson accompanied FBI agents to the field office and gave a statement there. J. A. 141-142. The District Court suppressed this statement, finding that Dickerson was in custody, even though not formally arrested, and had not received the warnings required by *Miranda* v. *Arizona*. J. A. 151-155.

On motion for reconsideration, the government argued, "At all events, since there is no evidence or even serious allegation that Dickerson's statements were involuntary, the statements are admissible under 18 U. S. C. 3501(a), which provides that 'in any criminal prosecution brought by the United States . . . a confession *shall be admissible* if it is voluntarily given' (emphasis added)." J. A. 87. The District Court denied the motion. J. A. 156. The court refused to consider the government's additional evidence on the ground it was available at the time of the original hearing. J. A. 159-160. The District Court did not address the § 3501 argument.

The government appealed. However, it reversed its position on § 3501, on which it had previously relied, and asserted that the statute was unconstitutional, J. A. 163, *United States* v. *Dickerson*, 166 F. 3d 667, 671 (CA4 1999). The Court of Appeals held that the District Court was within its discretion to refuse to consider belated evidence. J. A. 164, 166 F. 3d, at 671. Regarding § 3501, the Court of Appeals noted, "Over the past few years, career federal prosecutors have tried to invoke § 3501 in this Court only to be overruled by the Department of Justice." J. A. 187, 166 F. 3d, at 681. The court nonetheless proceeded to decide the issue. J. A. 191, 166 F. 3d, at 683; cf. *Stovall* v. *Denno*, 388 U. S. 293, 294, n. 1 (1967) (case decided on retroactivity, even though raised only by *amicus*); *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion) (same).

The Court of Appeals reversed, holding § 3501 was valid and that the District Court had implicitly held that the statement was voluntary. J. A. 211-212, 166 F. 3d, at 692. This Court granted certiorari, limited to Question 1. That question is the

constitutionality of § 3501. Pet. for Cert. i. The denied questions were the propriety of the Fourth Circuit's consideration of the issue and a Fourth Amendment claim. *Ibid.*

SUMMARY OF ARGUMENT

The *Miranda* rule is a rule of evidence. That case did not create any new constitutional rights. This Court's repeated characterizations of the *Miranda* rule as nonconstitutional are holdings, not dicta, necessary to the decisions in those cases.

The federal courts can create federal common law in certain specific cases of "uniquely federal interests." The federal law so created prevails over state law to the extent of any conflict, and when decided by the Supreme Court is binding precedent in state courts. Enforcement of federal constitutional rights is one of those areas.

A decision in this case upholding § 3501 would open the door to a fresh round of democratic debate on the admissibility of confessions. Further congressional action would be needed to lift the yoke of *Miranda* from state courts, but a favorable decision on § 3501 would provide the needed assurance that Congress can replace the *Miranda* rule. The legislative branch has superior flexibility to achieve a proper balance of interests.

If the Court is truly forced to a choice between constitutionalizing *Miranda* or overruling it, then it should overrule it. Either choice involves overruling precedents, so *stare decisis* does not indicate one choice over the other. The *Miranda* rule is not required by the Constitution.

ARGUMENT

I. *Miranda*'s irrebuttable presumption creates no constitutional right, but rather is a rule of evidence.

"[T]he rule of *Edwards* [v. *Arizona*, 451 U. S. 477 (1981)] is our rule, not a constitutional command . . . ." *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (Kennedy, J., dissenting). This is equally true of *Edwards*' parent decision, *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

When this Court chose to regulate custodial interrogations in *Miranda*, it was stepping into one of the clearest conflicts between the interests of the accused and of society. While some innocent suspects may be able to clear themselves during the interrogation, the overwhelming majority of suspects are likely to damage their interests by incriminating themselves. As Justice Jackson pointed out, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (Jackson, J., concurring in the result).

Yet society must be allowed to have its police interrogate suspects in custody. Banning custodial interrogation would effectively eliminate confessions from criminal trials. See *id.*, at 58. "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser" from too many restrictions on police interrogation. *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991). Voluntary confessions "are inherently desirable." *United States* v. *Washington*, 431 U. S. 181, 187 (1977). Indeed, obtaining proof beyond a reasonable doubt " 'often could not be achieved by the prosecution without the assistance of the accused's own statement.' " *Culombe* v. *Connecticut*, 367 U. S. 568, 576 (1961) (opinion of Frankfurter, J.). " 'Questioning suspects is indispensable in law enforcement.' " *Id.*, at 578. The public interest requires that police be allowed to conduct custodial interrogations. *Id.*, at 578-579. Custodial interrogation has long been understood to be "undoubtedly an essential tool in effective law enforcement." *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963).

Regulating police interrogations necessarily involves a balancing of interests. Every protection given to the custodial suspect is also an obstacle to solving crime. See *Culombe*, *supra*, 367 U. S., at 580. The amount of protection afforded the accused reflects a judgment on the relative worth of the interests of society and the accused: "Is it [defendant's] right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court

and also cannot question him before?" *Watts*, *supra*, 338 U. S., at 59 (Jackson, J., concurring in the result).

The *Miranda* decision swung the pendulum sharply towards the suspect's interests. This Court's policy judgment, given force through *Miranda*'s irrebuttable presumption and detailed code of procedure, created no constitutional right. See *Michigan* v. *Payne*, 412 U. S. 47, 54 (1973). *Miranda* is a rule of evidence. This decision does not have the same force as a constitutional precedent, but is instead an exercise of this Court's constitutional common law powers. See Part II, *infra*, at 13-21. *Miranda*'s subconstitutional status allows Congress to substitute its view of the appropriate balance of interests for the Court's in this crucial area of public policy.

A. Rule of Evidence.

Although the 50-plus page opinion sprawled over a wide range of topics, in the end *Miranda* is simply an exclusionary rule. The Court summarizes its own holding as this: "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, *supra*, 384 U. S., at 444.

Miranda's heart is found a few pages later.

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent. . . . The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." *Id.*, at 457.

"A *Miranda* violation does not *constitute* coercion but rather affords a bright-line legal presumption of coercion, requiring suppression of all unwarned statements." *Oregon* v. *Elstad*, 470 U. S. 298, 304, 307, n. 1 (1985) (emphasis in original); see also *New York* v. *Quarles*, 467 U. S. 649, 670 (1984) (O'Connor, J., concurring in judgment in part). *Miranda*'s presumption reflects this Court's choice of the appropriate balance between the suspect's protections from interrogation and society's need to solve crimes. See, *e.g.*, *Moran* v. *Burbine*, 475 U. S. 412, 433, n. 4 (1986) ("the [*Miranda*] decision . . . embodies a carefully crafted balance designed to fully protect *both* the defendant's and society's interests"). *Quarles*, 467 U. S., at 658. Although the opinion declared that voluntary confessions were a "proper element in law enforcement," *Miranda*, *supra*, 384 U. S., at 478, the *Miranda* Court chose to tilt the balance sharply in favor of the criminal defendant. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1469-1472 (1985). This balance carries out this Court's policy concerning police interrogation.

Miranda and subsequent decisions have noted the "inherently compelling pressures" of the interrogation room. See *Miranda*, *supra*, 384 U. S., at 467; *McNeil*, *supra*, 501 U. S., at 176; *Moran*, *supra*, 475 U. S., at 420. But this alone does not explain the *Miranda* presumption. While there may be some compulsion in any custodial interrogation, it must not be too compelling, since *Miranda* still allows waivers under these circumstances. See 384 U. S., at 535-536 (White, J., dissenting). If custodial interrogation were truly compelling as a matter of constitutional law, then the *Miranda* Court should have forbidden the practice.

As the *Miranda* Court implicitly recognized, there are many circumstances under which a suspect can give an unwarned, but still clearly voluntary custodial confession. In his dissent, Justice White produced a hypothetical that undercuts any presumption of compulsion in custodial interrogation.

> "Although in the Court's view in-custody interrogation is inherently coercive, the Court says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as 'Do you have anything to say?' or 'Did you kill your wife?' his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary." *Miranda*, *supra*, 384 U. S., at 533-534 (White, J., dissenting).

Justice White's common sense is supported by the facts. Judge Henry Friendly's public response to *Miranda* underscored the practical soundness of Justice White's hypothesis. "[T]he books are full of instances, of which the Court must have been well aware through petition for certiorari, where it is evident that in-custody interrogation did not represent the exercise of compulsion." H. Friendly, Benchmarks 272-273 (1967). Next, Judge Friendly lists four then-recent cases in which there was no question that the custodial interrogation produced a voluntary confession. See *id.*, at 273, nn. 33-36 (citing *United States* v. *Cone*, 354 F. 2d 119 (CA2 1965); *United States* v. *Indiviglio*, 352 F. 2d 276 (CA2 1965); *Evalt* v. *United States*, 359 F. 2d 53 (CA9 1966); *United States* v. *D'Allesandro*, 361 F. 2d 694, 698 (CA2 1966)). In the years since *Miranda*, this Court has often found confessions to be voluntary even though they were taken contrary to the *Miranda* procedures. See, *e.g.*, *Elstad*, *supra*, 470 U. S., at 312; *Oregon* v. *Hass*, 420 U. S. 714, 722 (1975); *Michigan* v. *Tucker*, 417 U. S. 433, 449 (1974); *Harris* v. *New York*, 401 U. S. 222, 224 (1971). The District Court implicitly found that in the present case. See *supra*, at 2. "One could go on endlessly; there are countless instances where a man apprehended with clear evidence of crime on his person or identified by witnesses will respond without the slightest pressure if obstacles are not artificially put in his way." Friendly, *supra*, at 273. There must be more to *Miranda* than any compulsion inherent in custodial interrogations.

The policy that ties *Miranda*'s many strands together is dissatisfaction with administering the voluntariness standard. See Gardner, Section 1983 Actions under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277, 1281-1282 (1993). This explains *Miranda*'s focus on custody. A station house can be very difficult for judicial scrutiny to penetrate. The *Miranda* rule finesses the problems with custody by overprotecting the Fifth Amendment privilege. Thus, "*Miranda*'s core virtue was affording police *and courts* clear guidance on the manner in which to conduct a custodial investigation." *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993) (emphasis added; internal quotations omitted). See also *California* v. *Prysock*, 453 U. S. 355, 359 (1981) (*per curiam*) (*Miranda* "obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions"); *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979). So long as *Miranda*'s i's are dotted and t's crossed, courts have much less need to undertake the potentially messy task of penetrating the interrogation room and utilizing the voluntariness test. Cf. *Berkemer* v. *McCarty*, 468 U. S. 420, 433, n. 20 (1984) (cases of colorable argument of compulsion when *Miranda* rule is followed are "rare").

The *Miranda* rule achieves this goal through a detailed code of interrogation procedure. See *Miranda*, *supra*, 384 U. S., at 504 (Harlan, J., dissenting); Friendly, *supra*, at 267-268 (*Miranda* as legislation); 3 J. Wigmore, Evidence § 826a, p. 383 (Chadbourn rev. 1970) (*Miranda* as "new 'code' "). The code is sufficiently complex that it must be interpreted by this Court. Compare *Michigan* v. *Mosley*, 423 U. S. 96, 102 (1975) (avoiding a literal interpretation of *Miranda* that would lead to an absurd result), with *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 454 (1989); *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 332-333 (1938) (statutory canon of avoiding literal interpretation that would lead to absurd results). *Miranda*'s code operates as a rule of evidence, an exclusionary rule. See *Elstad*, *supra*, 470 U. S., at 306 ("The *Miranda* exclusionary rule"). This rule of evidence is not a constitutional right, but, as this Court has often held, a prophylactic rule that overprotects the Fifth Amendment privilege to

advance this Court's policies through its constitutional common law function.

B. The Nonconstitutional Prophylactic.

Because *Miranda* is a rule of evidence that sweeps more broadly than the Fifth Amendment privilege, it creates no constitutional right. This is demonstrated by the many limits this Court has placed on *Miranda*. In *Johnson* v. *New Jersey*, 384 U. S. 719, 721 (1966), this Court declined to apply *Miranda* retroactively. It labeled *Miranda*'s procedures as "safeguards." *Id.*, at 730. Retroactively applying *Miranda* "would require the retrial or release of numerous prisoners found guilty *by trustworthy evidence* in conformity with previously announced constitutional standards." *Id.*, at 731 (emphasis added). If the act of taking a confession contrary to *Miranda* were truly unconstitutional, *i.e.*, if those confessions were truly compelled, then the evidence would be suspect and the case for retroactivity would have been much stronger. See *Michigan* v. *Payne*, 412 U. S. 47, 54 (1973).

The next chink in *Miranda*'s armor was found in *Harris*, *supra*, 401 U. S., at 226, which held that voluntary statements taken contrary to *Miranda* can be used to impeach the defendant's testimony. The deterrent of *Miranda*'s exclusionary rule was satisfied by excluding the evidence from the State's case-in-chief. *Id.*, at 225. By contrast, statements that are in fact unconstitutionally compelled cannot be admitted for impeachment. See *Mincey* v. *Arizona*, 437 U. S. 385, 397-398 (1978). Compelled statements are not the same as merely un-*Mirandized* statements. See *New Jersey* v. *Portash*, 440 U. S. 450, 459 (1979). Application of *Miranda* permits balancing because it involves no actual constitutional violation, while use of actually compelled statements is constitutionally prohibited, permitting no balancing. See *infra*, at 25.

The cases which nail down the nonconstitutional status of *Miranda* are the "fruit of the poisonous tree" cases: *Michigan* v. *Tucker*, *supra*, and *Oregon* v. *Elstad*, *supra*. *Tucker* involved a statement taken with advisements and a waiver but without notice that a lawyer would be provided without charge if the suspect could not afford one. See 417 U. S., at 436. The

statement itself was suppressed, but the testimony of a witness revealed by the statement was admitted. *Id.*, at 436-437. The questioning was before *Miranda*, but the trial was afterward, and hence *Miranda* applied. *Id.*, at 435.

Tucker's argument was that the "fruit of the poisonous tree" doctrine developed in Fourth Amendment cases required exclusion of the "fruit." The *Tucker* Court rejected the argument based squarely on the nonconstitutional status of *Miranda*.

> "This Court has also said, in *Wong Sun* v. *United States*, 371 U. S. 471 (1963), that the 'fruits' of police conduct which *actually* infringed a defendant's Fourth Amendment rights must be suppressed. But we have already concluded that the police conduct at issue here *did not abridge respondent's constitutional privilege against compulsory self-incrimination*, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege. Thus . . . there is no controlling precedent . . . to guide us." *Id.*, at 445-446 (footnote omitted; emphasis added).

While the *Tucker* Court arguably might have distinguished *Wong Sun* on some other ground, it actually distinguished that case on the constitutional versus nonconstitutional status of rules violated. See also *id.*, at 444. This is the *ratio decidendi* of the case.

Oregon v. *Elstad*, *supra*, reiterates this holding. That case involved a claim that a properly warned statement of the defendant himself was "tainted" by a prior, unwarned statement, again relying on *Wong Sun*. See *Elstad*, *supra*, 470 U. S., at 302-303. The Court noted that Elstad's *Wong Sun* argument "assumes the existence of a constitutional violation." *Id.*, at 305. That assumption was incorrect. The *Elstad* Court reaffirmed *Tucker*'s holding that *Wong Sun* was not controlling because "there was no actual infringement of the suspect's constitutional rights . . . ." *Id.*, at 308.

In dissent, Justice Stevens made precisely the argument that the government and the defendant make in the present case, *i.e.*, that the authority of the Court to impose the *Miranda* rule on the states necessarily implies that the rule is constitutionally

required. *Id.*, at 370-371. The *Elstad* Court rejected that argument. See *id.*, at 306-307, n. 1 (majority opinion); cf. *id.*, at 370, n. 15 (Stevens, J., dissenting). The Court reaffirmed that "a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Id.*, at 306, n. 1. *Miranda* is a nonconstitutional rule of evidence. See *supra*, at 6.

Against the square holdings of *Tucker* and *Elstad*, where the nonconstitutional status of *Miranda* was the *ratio decidendi* of the case, the government submits *obiter dicta* in cases where the status made no difference. See Brief for the United States 24-25. *Illinois* v. *Perkins*, 496 U. S. 292, 296 (1990) held that the inherent compulsion in *Miranda* did not extend to the undercover agent situation, and hence the rule did not extend there. *Butler* v. *McKellar*, 494 U. S. 407, 411 (1990) merely described the holding of an earlier case. Such a description is dictum. See *Maryland* v. *Wilson*, 519 U. S. 408, 412 (1997). *Michigan* v. *Jackson*, 475 U. S. 625, 629-630 (1986) involved the Sixth Amendment right to counsel. Whether the *Miranda* rule was itself required by the Fifth Amendment was not before the Court. *Moran* v. *Burbine*, *supra*, 475 U. S., at 419, involved a lower court holding that failure to inform an arrestee that an attorney had called fatally tainted an otherwise valid waiver of the self-incrimination privilege. This Court reversed because such a rule "would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all." *Id.*, at 427. That holding and the reason for it did not depend on the status of *Miranda* as constitutional versus prophylactic. The tangential reference to "our interpretation of the Federal Constitution," *ibid.*, cannot be understood to overrule the square holding of *Elstad*, decided only a year earlier and authored by the same Justice, or *Tucker*, a decision it quotes on this very point. See *id.*, at 424-425 (quoting *Quarles* quoting *Tucker*). Finally, *Edwards* v. *Arizona*, 451 U. S. 477, 481 (1981) merely makes another passing reference to the holding of an earlier case, which is dictum. *Edwards* reconfirmed the holdings of earlier cases, see *id.*, at 485, and the constitutional status of the rules was not in issue.

The government relies on a statement from *Withrow* v. *Williams*, *supra*, that "[p]rophylactic though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a fundamental trial right," 507 U. S., at 691 (emphasis and internal quotation marks omitted). This did not establish *Miranda* as a constitutional right. On the contrary, the decision is expressly premised on the assumption "that *Miranda*'s safeguards are not constitutional in character . . . ." *Id.*, at 690.[2] The government is incorrect when it attempts to separate *Miranda*'s status as a prophylactic rule from its nonconstitutional status. See Brief for the United States 24-25. "Like all prophylactic rules, the *Miranda* rule 'overprotects' the value at stake." *Duckworth* v. *Eagan*, 492 U. S. 195, 209 (1989) (O'Connor, J., concurring). *Miranda* is prophylactic because it "sweeps more broadly than the Fifth Amendment itself" "and may be triggered even in the absence of a Fifth Amendment violation." *Elstad*, *supra*, 470 U. S., at 306. Since its rule goes beyond what the Fifth Amendment requires, the *Miranda* prophylactic logically must be extraconstitutional.

The nonconstitutional status of *Miranda* is inescapable. The policy reasons that form its rationale, its extraconstitutional scope, and the many limits this Court has placed on the initial *Miranda* ruling all point to a decision that involves something other than a constitutional right. The *Miranda* Court chose to displace analysis of the actual voluntariness of the custodial confession with a prophylactic bright-line rule that purported to keep courts from having to penetrate the interrogation room in any great depth. *Miranda* therefore is best explained as an

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2. The unequivocal holding of *Withrow*, that diminished review on habeas does not follow from nonconstitutional status, *ibid.*, demolishes the argument that constitutional status may be inferred from cognizability on habeas. See Brief for the United States 24. The argument that the word "laws" in 28 U. S. C. § 2254(a) can only refer to statutes, not common law, is patently meritless in any event. The opposite proposition had been established in one of the great cases of American jurisprudence a mere ten years before Congress enacted § 2254. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 72-73 (1938). Congress was surely aware of that construction.

exercise of this Court's constitutional common law function, which can be revised by Congress.

II. The Supreme Court can create common law rules for the adjudication of constitutional rights which are binding on the states but subject to revision by Congress.

The defendant and the government assert that the rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) must be required by the Constitution, because otherwise it could not be binding on state courts. See Brief for the United States 23-24; Brief for Petitioner 20-21. They assert this with all the confidence of a bridge player who has just led the ace of trumps for the rubber trick, and thus gloss over the main point of this case.

Their ace is actually a deuce. There are many areas of law in which this Court establishes federal common law (*i.e.*, judge-made) rules binding on the states yet subject to revision or abrogation by Congress. *Miranda* is just one of many.

The theory of the legitimacy of such rules is laid out in Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975). The defense lawyer *amici* refer to this work disparagingly as a "twenty-five-year-old law review article," see Brief for National Ass'n of Criminal Defense Lawyers et al. as *Amici Curiae* 16, as if the force of the argument is somehow diminished merely by the passage of time. Wisdom too often never comes, and so one ought not reject it merely because it came early. Cf. *Henslee* v. *Union Planters Bank*, 335 U. S. 595, 600 (1949) (Frankfurter, J., dissenting).

A. Federal Interests.

"The clarion yet careful pronouncement of *Erie*, 'There is no federal general common law,' opened the way to what, for want of a better term, we may call specialized federal common law." H. Friendly, Benchmarks 178 (1967). There are many areas which this Court has held to be governed by federal law even though that law cannot be found in the Constitution or any Act of Congress. Admiralty and maritime law is one such area. The Constitution includes these cases in the jurisdiction of federal courts. See U. S. Const., Art. III, § 2. However, the courts of one sovereign may hear cases arising under the laws

of another, see The Federalist No. 82, p. 493 (C. Rossiter ed. 1961) (A. Hamilton), so it does not follow that the substance of maritime law must be federal. Even so, this Court does hold that the law is federal, see, *e.g.*, *Moragne* v. *State Maritime Lines, Inc.*, 398 U. S. 375, 401, n. 15 (1970), fashioned by courts in the absence of congressional action but always subject to revision by Congress. See *In re Garnett*, 141 U. S. 1, 12 (1891); 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 3.4, pp. 352-355 (3d ed. 1999).

Federal common law, and not the state law of contracts and shipping documents, determined the outcome in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964). In a diversity jurisdiction case, see *id.*, at 421, n. 20, the federal common law "act of state doctrine" was held controlling. See *id.*, at 439. Although it has "constitutional underpinnings," this doctrine is not constitutionally required, see *id.*, at 423, yet it determined the outcome of a case otherwise governed by state law.

Labor contracts are another area where federal common law has trumped state law. Congress has assigned labor contract cases to federal courts, 29 U. S. C. § 185(a), and this statute, purely jurisdictional on its face, has been held to "express[ ] a federal policy that the substantive law to apply . . . 'is federal law, which the courts must fashion from the policy of our national labor laws.' " *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 209 (1985) (quoting *Textile Makers* v. *Lincoln Mills*, 353 U. S. 448, 456 (1957)). Under this doctrine, *Allis-Chalmers* reversed the judgment of a state court in a state-law tort case, on the ground that allowing the tort claim would subvert the congressional goal of a unified body of labor contract law. *Id.*, at 220.

Federal interests similarly scuttled a state-law tort suit in *Boyle* v. *United Technologies Corp.*, 487 U. S. 500 (1988). No federal statute proscribed this design defect suit against a federal contractor.

> "But we have held that a few areas, involving 'uniquely federal interests,' [citation] are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.' " *Id.*, at 504 (citing *Banco Nacional*, *supra*, and other cases).

The existence of federal common law binding on state courts is not an "untenable theory," cf. Brief for the United States 26, but rather a legal doctrine established beyond serious dispute. The government's catalog of prophylactic rules, see *id.*, at 44-47, confirms rather than refutes that criminal procedure cases are included.

Those seeking to discredit the federal common law thesis as applied to criminal procedure have claimed it is limited to cases where uniformity is the federal interest. See Schrock & Welsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117, 1134 (1978). *Boyle* negates this notion. The federal interest threatened by the state tort law was the ability of the government to get its contracts filled at the lowest possible price, *Boyle*, *supra*, 487 U. S., at 507, not uniformity of law. The touchstone is "uniquely federal interests," *id.*, at 504, which might be a need for uniformity, see *id.*, at 508, or might be something else.

That "something else" may be enforcement of federal rights, whether constitutional or statutory. In *Town of Newton* v. *Rumery*, 480 U. S. 386, 390-391 (1987), the plaintiff had entered into a contract releasing his federal civil rights claims, primarily Fourth Amendment claims, against the town. The Court held perfunctorily that the validity of the release would be governed by federal law. *Id.*, at 392. That law was not established by statute. It was determined by courts "by reference to traditional common-law principles." *Ibid.*

Considering *Town of Newton* in light of *Boyle*, we may ask what is the "uniquely federal interest" that allows federal common law to override otherwise applicable state law on the validity of contracts. Only one interest appears pertinent—the federal interest in enforcing the Fourteenth Amendment, including the "incorporated" provisions of the Bill of Rights. That is precisely the same interest involved in the remedies and criminal procedure cases.

B. Remedies and Review.

When one person has wrongfully injured another in his person, property, or reputation, the usual remedy is damages in tort in a suit brought under state law. However, when the malefactor is an employee of the federal government and the wrong is a violation of the Constitution, the plaintiff will find his remedy governed largely by federal law, primarily judge-made federal law.

On one side, the plaintiff who seeks traditional tort remedies will find the reach of the state law remedy limited by the doctrine of immunity. In *Barr* v. *Matteo*, 360 U. S. 564 (1959) and *Howard* v. *Lyons*, 360 U. S. 593 (1959), the plaintiffs brought libel suits under local defamation law. See *Barr*, at 577, n. * (Black, J., concurring in the judgment). Both suits were barred by a body of federal law, which "has in large part been of judicial making." *Id.*, at 569 (plurality opinion). This federal common law prevailed over state and District of Columbia law, but it was subject to the power of Congress to substitute a different rule. See *id.*, at 577 (Black, J., concurring in the judgment).

On the other side of the remedial coin, we find *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). That case created, in effect, a federal common law tort action for the violation of federal constitutional rights by federal officers. The *Bivens* action, however, is not constitutionally required. Congress has broad powers over the scope of remedies. In *Schweiker* v. *Chilicky*, 487 U. S. 412 (1988), the Court declined to extend *Bivens* to a case of denial of a benefit without due process because Congress had provided another remedy, even though that remedy fell well short of complete relief. *Id.*, at 425. "It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension." Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1366 (1953).

Given these rules, we may ask several questions. By what authority does the United States Supreme Court block a state-

law tort action when no federal statute or constitutional provision forbids it? By what authority does the Court authorize a federal-question lawsuit by one individual against another in the absence of a statute providing an action? And by what authority does Congress substitute an incomplete remedy for that cause of action?

The answer must be that protection of federal constitutional rights and protection of federal employees from lawsuits over the performance of their duties are "uniquely federal interests" within the meaning of *Boyle*, *supra*. Courts create the governing law, but Congress has the last word if it chooses to speak. Either way, federal law prevails over state law to the extent of a conflict. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 876-877 (4th ed. 1996).

The rule of *Chapman* v. *California*, 386 U. S. 18 (1967) is analogous to *Bivens*. See Meltzer, Harmless Error and Constitutional Remedies, 61 U. Chi. L. Rev. 1, 29-30 (1994). A criminal appellant with a constitutional claim, like a *Bivens* plaintiff, is the moving party, claims that his rights have been violated, claims he has been injured by the violation, and seeks relief. The injury and relief components of the claim are where federal common law comes in.

Chapman involved a state constitutional provision, the predecessor of Cal. Const., Art. VI, § 13, which established a standard for deciding reversible versus harmless error. See *Chapman*, *supra*, 386 U. S., at 20, n. 3. *Chapman* held that federal law overrode the state standard. *Id.*, at 20-21. "The *Chapman* opinion was cryptic, however, about the source of the rule it announced." Meltzer, *supra*, 61 U. Chi. L. Rev., at 2. Space does not permit an extended discussion here, but Professor Meltzer reviews the possible sources and concludes "that the harmless error rule should be seen as constitutional common law." *Id.*, at 26. In particular, the *Chapman* standard is not mandated by the Constitution. See *id.*, at 24-26. As the *Chapman* opinion itself states, the responsibility, and presumably the authority, of the Court to fashion a rule exists only "in the absence of appropriate congressional action." 386 U. S., at 21. A court-made rule which overrides a state constitutional

provision, yet is subject to revision by Congress, can only be explained as federal common law.

Miranda and *Chapman* are strongly analogous in that both rules recognize the inherent uncertainty of the underlying determination, and both are based on an assessment of the relative harm of erring in one direction versus the other. See *supra*, at 6. If we always knew to a certainty whether an error contributed to a verdict or not, there would be no need for a harmless error "standard." Errors known to be harmful would be remedied by reversal, and those known to be harmless would not. A standard of "beyond a reasonable doubt" implements a value judgment that error in one direction is far worse than error in the other. See *In re Winship*, 397 U. S. 358, 364 (1970). The *Chapman* standard accepts reversal of a large number of judgments for errors which probably did not affect the verdict as the price for fixing those errors that did affect the verdict, but which might be erroneously judged harmless under a lesser standard. That reasonable people might differ on this value judgment is illustrated by the large number of states with less rigid rules before *Chapman*. See Meltzer, *supra*, 61 U. Chi. L. Rev., at 22, n. 89. *Miranda* similarly skews the risk of error. A large number of voluntary, and hence constitutional, confessions are excluded in order to minimize the risk of erroneously letting in an occasional involuntary one. See *supra*, at 6-7. *Miranda* and *Chapman* belong to the same species. Both are federal common law rules, created to safeguard constitutional rights but not themselves constitutionally required.

C. Legitimacy and Danger.

The objection is made that recognizing such a common-law-making power in this Court would dangerously expand the Court's power. See Schrock and Welsh, *supra*, 91 Harv. L. Rev., at 1126-1127. There are two answers. First, the power should be carefully limited to that needed to effectuate constitutional rights and not to expand the scope of those rights, similar to the limits on Congress's power under § 5 of the Fourteenth Amendment. Second, however dangerous the power to make rules like *Miranda* might be if they are subject to revision by Congress, the power to make the same rules

immune from revision by Congress would be vastly more dangerous.

Amicus parts company with Professor Monaghan when he says constitutional common law could be used "to impose on the states . . . all the best features of the Federal Rules of Criminal Procedure and the Federal Rules of Evidence." Monaghan, *supra*, 89 Harv. L. Rev., at 43. That would be precisely the supervisory power this Court has always disclaimed. See, *e.g.*, *Victor* v. *Nebraska*, 511 U. S. 1, 17 (1994).

The proper line of demarcation is between the scope of the right and the enforcement of the right. This is the same line that marks the limit of Congress's enforcement powers. Congress cannot expand the substantive scope of rights so as to take from states powers left to them by the Constitution. See *City of Boerne* v. *Flores*, 521 U. S. 507, 519 (1997). Enforcement may sometimes sweep more broadly than the constitutional provision itself, when necessary to protect a right from being denied in practice through the burden and uncertainty of case-by-case litigation. A ban on all literacy tests for voting, for example, swept out valid tests along with the ones so notoriously used for racial discrimination, yet the ban was valid. See *Oregon* v. *Mitchell*, 400 U. S. 112, 283-284 (1970) (Stewart, J., concurring in part and dissenting in part). This Court refers to such legislation as "prophylactic," see *Kimel* v. *Florida Bd. of Regents*, 528 U. S. __ (No. 98-791, Jan. 11, 2000) (slip op., at 24), the same word it uses to describe *Miranda*.

As applied to criminal procedure, enforcement consists of two kinds of rules. Some enforcement rules govern the procedure and evidence by which a court determines whether a violation has occurred, or, in self-incrimination suppression hearings, whether admission of the evidence would be a violation. The other kind of enforcement rule is a rule of remedy. Once a court determines a violation has occurred, what, if anything, does it do about it? *Chapman* and *Mapp* v. *Ohio*, 367 U. S. 643 (1961) are rules of remedy. These two kinds of rules are different from rules defining the scope of the right, such as whether a detention is "reasonable," see, *e.g.*, *Illinois* v. *Wardlow*, 528 U. S. __ (No. 98-1036, Jan. 12, 2000),

or whether a definition of "reasonable doubt" comports with the Due Process Clause. See, *e.g.*, *Victor*, *supra*, 511 U. S., at 15.

The distinction can be illustrated by comparing the law of admissibility of confessions with the law of admissibility of prior convictions. The better practice, it is widely recognized, is to keep the information on prior convictions presented to the jury to the minimum the jury needs to answer the questions before it. See *Old Chief* v. *United States*, 519 U. S. 172, 185-186 (1997). This Court can require federal district courts to observe that practice in federal prosecutions, either by supervisory power or by extrapolation from the very general wording of federal rules. See *id.*, at 191-192. However, there is no constitutional prohibition against telling the jury about the priors. See *Spencer* v. *Texas*, 385 U. S. 554, 563 (1967). As there is no constitutional violation and no danger of one, this Court has no authority to impose the better practice on the states. See *id.*, at 564. With confessions, the Constitution draws the line at voluntariness. The Constitution itself excludes confessions which are actually over the line, and the federal enforcement power is limited to excluding those which present an unacceptable risk of being over the line. How much risk is acceptable is a policy choice subject to congressional revision.

Miranda thus falls with a narrow definition of the constitutional common law, one that can be adopted without making the federal judiciary a more dangerous branch than it already is. The competing proposition, that this Court should constitutionalize *Miranda*, involves a far greater danger. Indeed, the very idea that judicial restraint could be proffered as a rationale for this step is remarkable, to say the least. As we discuss in part IV, *infra*, at 26, *Miranda* had no basis in precedent or in the text or history of the Constitution. If the Fifth Amendment did not require this formulation when it was adopted, did not require it when it was "incorporated" in the Fourteenth, and did not require it any time prior to 1966, how can it require it today? That would be possible only if this Court had the power to enlarge the scope of constitutional rights based on its own notions of policy, as opposed to construing the Constitution based on its text and history to determine what rights it actually confers. The power to not only promulgate a

rule like *Miranda* but also to place it above congressional revision would be vastly more dangerous than a properly limited common law enforcement power.

III. Upholding Section 3501 will begin a fresh round of democratic debate on the admissibility of confessions.

A decision upholding 18 U. S. C. § 3501 would not be the end of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). It would not even be the beginning of the end. It might be the end of the beginning. Cf. W. Churchill, Speech at the Lord Mayor's Day Luncheon (Nov. 10, 1942), quoted in J. Bartlett, Familiar Quotations 746 (15th ed. 1980).

The statute, by its terms, applies only to federal prosecutions. See § 3501(a). These are the cases where *Miranda* was least needed. Federal law enforcement had already adopted a form of warning before *Miranda*, see 384 U. S., at 483-484, and doubtless will continue giving warnings under the statute. See § 3501(b)(3), (4) (warnings are a factor in determining voluntariness); see also Brief for FBI Agents Association as *Amicus Curiae*. As federal common law, *Miranda* will continue as controlling precedent in state courts unless and until Congress replaces it with a different rule. Upholding § 3501 would make a dramatic change in the legislative landscape, however, by confirming that Congress does have broad power to prescribe the rules of procedure and evidence for the adjudication of self-incrimination claims.

Those who view the American people as knuckle-dragging Neanderthals with contempt for the Bill of Rights recoil in horror at the very suggestion that the people, through the democratic process, might review and revise the inspired wisdom of *Miranda*. *Amicus* CJLF has a more optimistic view of our countrymen.

Defendant asserts that *Miranda* has widespread acceptance beyond the legal culture, Brief for Petitioner 44, *i.e.*, among the public as a whole. To the extent this statement refers to the core *Miranda* holding—mandatory warnings for suspects actually arrested—we concur. That is why the warnings are in little or no danger from future congressional action. Although

Congress could simply make §3501 apply to the states, it is unlikely to do so. The 1968 act was a legislative overreaction to judicial overreaching: Newton's Third Law applied to politics. Now that tempers have cooled for over three decades, a fresh examination by Congress will surely produce a more nuanced approach. The assertions of law enforcement support for giving the warnings, see Brief of Griffin B. Bell *et al.* as *Amici Curiae* 8-11, are beside the point.

The government notes, and *amicus* agrees, that the core *Miranda* requirement is easily applied. Brief for the United States 34-35. The government further notes, again correctly, that the extensions of *Miranda* have blurred the bright line that was originally the rule's greatest virtue. See *id.*, at 35-36. Even the original rule loses its bright-line character when applied to persons who claim to have been "in custody," even though not formally arrested, see *id.*, at 36, n. 26, as the present case vividly illustrates. Difficult questions of voluntariness are simply replaced by "murky and difficult questions of when 'custody' begins." *Oregon* v. *Elstad*, 470 U. S. 298, 316 (1985).

Surprisingly, the government submits these observations in support of an argument to cast *Miranda* into constitutional concrete. *Amicus* submits that these are powerful arguments to return the issue to legislative control. Congress could require the warnings for those formally arrested and then specify in objective terms what other circumstances will trigger the requirement. Congress could reconsider whether an appropriate weighing of the costs and benefits really warrants the rule of *Arizona* v. *Roberson*, 486 U. S. 675 (1988), and it could do so free of the baggage of *stare decisis*.

As another example, the rule of *Doyle* v. *Ohio*, 426 U. S. 610 (1976) excludes valid, probative evidence. See *Brecht* v. *Abrahamson*, 507 U. S. 619, 628 (1993). It does so even though use of an arrestee's silence does *not* violate the self-incrimination privilege. *Ibid.* It does so only because the use contradicts the implied promise of the mandatory warnings. *Id.*, at 628-629. Once the language of the warnings is under legislative control, Congress could deal with this problem by altering the wording of the warnings, thus restoring a valid and

valuable source of evidence needlessly excluded by current doctrine.

In Britain, the warnings are established by regulation. See Police and Criminal Evidence Act of 1984, § 66, 12 Halsbury's Statutes of England and Wales 873 (4th ed. 1997). The opposite of our *Doyle* rule is established by statute, see Criminal Justice and Public Order Act of 1994, § 34, 17 Halsbury's Statutes, at 278-279, and so the warning was modified to conform. *Id.*, at 279, notes. British arrestees are now warned, "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence." Police and Criminal Evidence Act, Codes of Practice, Code C § 10.4 (rev. ed. 1999). This warning, *amicus* submits, strikes the balance better than *Miranda*/*Doyle*. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1469 (1985).

A legislatively controlled law of confessions could take better advantage of changing technology. As recording becomes easier and cheaper, a rule to record all station-house interrogations might be a preferable substitute. See Gardner, Section 1983 Actions Under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277, 1287 (1993). To find out whether it is, Congress could authorize a pilot program limited in time and territory, something the judicial branch could never do through legitimate constitutional jurisprudence.

The original *Miranda* opinion invited legislative participation, see 384 U. S., at 467, but under conditions no responsible legislator could support. The invitation to construct alternatives came with the implied threat to strike them down *ex post facto* if the Court found they did not provide equally effective protection for the suspect. See *ibid.*; Gardner, *supra*, 30 Am. Crim. L. Rev., at 1287. Invalidation of a standard practice is a disaster, requiring an already overburdened system to retry and possibly set free thousands of convicted criminals. *Miranda*'s invitation gave legislatures a choice between a procedure the Court had endorsed and a stroll through a minefield. While a state might add additional procedures on

top of *Miranda*, no responsible legislature or executive could risk experimenting with a substitute under such conditions. Only a recognition of broad congressional authority, without the strict scrutiny implied by *Miranda*, will invigorate a fresh democratic debate.

The main impediment to legislative action to enforce the Fifth Amendment is not hostility to civil liberties but simply inertia. Criminal law is not high on the legislative priority list, a problem of long standing. See 4 W. Blackstone, Commentaries 4 (1st ed. 1769).[3] In this case, inertia is on *Miranda*'s side. That precedent remains applicable to the states until new congressional action provides a substitute.

It is high time for a fresh examination of the tangled mass of rules and subrules that make up the body of jurisprudence begun by *Miranda* and extended by cases such as *Roberson* and *Doyle*. The legislative branch has the flexibility and adaptability the task requires. It is time to remove the *Miranda* straitjacket and allow the people's representatives to resolve these issues. *Amicus* CJLF urges the Court to throw open the doors and let in the fresh air of a robust new round of democratic debate.

IV. If *Miranda* cannot be explained as an exercise of this Court's constitutional common law powers, then it should be overturned.

The government first asserts that there are only two paths this Court can follow—constitutionalize *Miranda* or overrule it. Brief for the United States 29. The government then asserts *stare decisis* as blocking the overruling path, leaving only constitutionalization. *Id.*, at 29-31. The defendant makes a similar argument. Brief of Petitioner 30-31.

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3. "Were even a committee appointed but once in a hundred years to revise the criminal law, it could not have continued to this hour [1769] a felony without benefit of clergy [*i.e.*, a capital offense], to be seen for one month in the company of persons who call themselves, or are called, Egyptians."

Actually, *stare decisis* blocks *both* paths. If the Court is really forced to the choice the government asserts is necessary, then it will have to overrule some precedent—either *Miranda* itself with all its progeny or the many cases holding that the Constitution does not require the *Miranda* rule.

As noted earlier, this Court has often labeled *Miranda*'s rules and procedures, not as constitutional rights themselves, but as prophylactic safeguards for the Fifth Amendment privilege. See *supra*, at 9-13. Such statements are not dicta, but instead play a central role in limiting *Miranda*'s invasive regulation of police procedure. Thus in *New York* v. *Quarles*, 467 U. S. 649, 655-658 (1984), this Court could engage in a balancing of interests and craft a public safety exception to *Miranda* because "[t]he prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution.' " *Id.*, at 654 (quoting *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974)). By comparison, the constitutional right to be free from compelled self-incrimination is not amenable to any policy related to balancing of interests. In *New Jersey* v. *Portash*, 440 U. S. 450 (1979), this Court held that compelled but immunized testimony could not be used to impeach the declarant in a subsequent criminal proceeding. This Court distinguished such testimony from statements taken contrary to *Miranda*, which can be used to impeach. See *Oregon* v. *Hass*, 420 U. S. 714, 723-724 (1975); *Harris* v. *New York*, 401 U. S. 222, 225 (1971).

> "Balancing of interests was thought to be necessary in *Harris* and *Hass* when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the *constitutional* privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible." *Portash*, *supra*, 440 U. S., at 459 (emphasis added).

The limits on *Miranda* such as those found in *Quarles*, *Harris*, *Hass*, *Michigan* v. *Tucker*, 417 U. S. 433, 445 (1974) (fruit of the poisonous tree doctrine inapplicable to *Miranda*), *Oregon* v. *Elstad*, 470 U. S. 298, 308 (1985) (same), *Duckworth* v. *Eagan*, 492 U. S. 195, 203 (1989) (variation on

Miranda warnings), and *McNeil* v. *Wisconsin*, 501 U. S. 171, 180-182 (1991) (request for counsel at judicial proceeding is not a *Miranda* invocation) would probably not survive *Miranda*'s transformation from a nonconstitutional prophylactic to a constitutional right. The balancing of interests that is the hallmark of most of this Court's *Miranda* jurisprudence cannot be squared with a decision in this case equating the *Miranda* procedures with the actual Fifth Amendment privilege. Transforming *Miranda* into a constitutional right would leave this Court with two choices: either raise *Miranda* violations to the level of actually, as opposed to presumptively, compelled self-incrimination, and thus overruling much of its *Miranda* jurisprudence, or lower Fifth Amendment standards by treating all instances of compelled self-incrimination as this Court currently treats *Miranda* violations, which would require overturning many Fifth Amendment cases. Whether this Court raises *Miranda* or lowers the Fifth Amendment standard, much of its jurisprudence would have to be overturned.

This eliminates *stare decisis* as a justification for preserving a constitutionalized *Miranda* rule. *Stare decisis* should not prevent the reexamination of an inconsistent line of cases, such as when later decisions erode the authority of earlier cases. See *Agostini* v. *Felton*, 521 U. S. 203, 235-236 (1997). This is particularly true in cases of constitutional criminal procedure, where *stare decisis* interests are at their weakest. See *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991).

If some case must fall, it should be *Miranda*. *Miranda* is "poor constitutional law." *Miranda*, *supra*, 384 U. S., at 504 (Harlan, J., dissenting). This decision was literally unprecedented. "The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment." *Id.*, at 526 (White, J., dissenting). When this Court first applied the Fifth Amendment to federal custodial interrogation, it relied on a voluntariness test; no special warnings or other procedures were involved. See *Bram* v. *United States*, 168 U. S. 532, 557-558 (1897). Until *Miranda*, all state and federal confessions

were analyzed under the same voluntariness inquiry. *Miranda* was an unanticipated shock to the criminal justice system that would have been disastrous if applied retroactively. See *Johnson* v. *New Jersey*, 384 U. S. 719, 731 (1966).

Miranda was unprecedented because its essence was based on faulty logic. *Miranda*'s "right of silence," *Miranda*, *supra*, 384 U. S. at 444, is incorrect Fifth Amendment law. "[T]he right, or better the privilege, is against being *compelled* to speak" rather than staying silent. H. Friendly, Benchmarks 271 (1967) (emphasis added). This difference is more than "mere semantics; it goes to the very core of the problem since the privilege exists only when the statement is compelled, the question of waiver is not reached until compulsion has been shown." *Ibid.* The *Miranda* majority leapt over this gap in its logic through its "conclusive presumption" that a person undergoing custodial interrogation " 'cannot be otherwise than under a compulsion to speak.' " See *ibid.* (quoting *Miranda*, 384 U. S., at 467); *supra*, at 5.

The conclusive presumption that compulsion follows from custody is as wrong as it was unprecedented. Before *Miranda*, custody had merely been one factor in determining whether the confession was in fact compelled. See, *e.g.*, *Bram*, *supra*, 168 U. S., at 558. As the *Miranda* majority admitted, the dissents proved, and experience confirmed, unwarned custodial confessions are quite capable of being voluntary. See *supra*, at 6-7. Indeed, voluntariness is the norm for unwarned custodial confessions. The best research available when *Miranda* was decided showed that police interrogation procedures substantially complied with Fifth Amendment and Due Process requirements. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1443-1444 (1985). When *Miranda* was decided, "the law enforcement establishment was engaged in a critical self-examination of its procedures." *Ibid.* *Miranda* cut dead this reform movement, replacing it with a detailed code of procedure based upon an unwarranted presumption of compulsion. "The Court disserves its great role as vindicator of the Bill of Rights when it constructs from plainly inadequate data a generalization refuted by the common experience of mankind." Friendly, *supra*, at 273.

Miranda's greatest flaw is self-admitted; it excludes voluntary confessions. See *supra*, at 6-7. Voluntary confessions are essential to the vital task of detecting and prosecuting crime. See *supra*, at 4. Every lost voluntary confession threatens to free a guilty criminal or force victims to undergo needless, traumatic litigation. Thus even though Ernesto Miranda's confession was obtained "without any force, threats or promises" and was "unmarked by any of the traditional indicia of coercion," see *Miranda*, *supra*, 384 U. S., at 518-519 (Harlan, J., dissenting), the woman he brutalized was forced to endure again the pain and indignity of testifying about the rape, because his voluntary confession was not protected by the *Miranda* talisman.

By unnecessarily limiting custodial interrogation and its final product, voluntary confessions, *Miranda* does a grave and continuing disservice to society. Society has no greater function than to protect its people and their property from crime. See *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983). In its great rush to place suspects on a level playing field with the police, the *Miranda* majority ignored the many nameless victims of crimes not prosecuted and guilty criminals let free because *Miranda* and its progeny prevent the police from obtaining or the courts from utilizing voluntary confessions.

> "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case." *Miranda*, *supra*, 384 U. S., at 542-543 (White, J., dissenting).

The government's claim that *Miranda*'s bright line should be kept because it is easily followed by police and courts, see Brief for United States 31-36, is a tattered fig leaf that fails to cover *Miranda*'s glaring faults. As the government admits, *Miranda* has its difficulties, particularly with regard to custody, and invocation of counsel under *Edwards* v. *Arizona*, 451 U. S. 477 (1981). See Brief for United States 35. Furthermore, *Miranda*'s alternative, the voluntariness standard, is sufficient. Voluntariness was acceptable for the almost 70 years between *Bram* and *Miranda*. The decision declining to apply *Miranda* retroactively referred to the voluntariness standard as having grown "increasingly meticulous through the years." *Johnson*, *supra*, 384 U. S., at 730. Furthermore, many confessions that are excluded from the case-in-chief under *Miranda* currently must still run the voluntariness gauntlet, if the confession is to be used for impeachment or if the defendant seeks to exclude derivative evidence. See, *e.g.*, *Mincey* v. *Arizona*, 437 U. S. 385, 396-398 (1978); J. A. 212. *Miranda*'s minimal convenience does not justify the harm it does to public safety or the Constitution.

As Dean Caplan notes, the *Miranda* majority's emphasis on fairness for the accused at the expense of society's legitimate interest in prosecuting crime is an example of the sporting theory of justice. See Caplan, *supra*, 38 Vand. L. Rev., at 1441-1443. *Miranda*'s gamesmanship has no place in the Constitution. "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire* v. *United States*, 273 U. S. 95, 99 (1927); accord *United States* v. *Ceccolini*, 435 U. S. 268, 279 (1978). Congress's solution is an improvement over *Miranda*, even if it is not the optimum solution.

The rules of *Miranda* and its progeny are not constitutional commands. *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (Kennedy, J., dissenting). If this Court should decide that the choice is really between overruling *Miranda* and striking down § 3501, along with all the cases holding that *Miranda* is not constitutionally required, then *Miranda* should go.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

March, 2000

Respectfully submitted,

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